SUPREME COURT
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-748**

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

*Petitioners,*

—v.—

MOBILE STEAMSHIP ASSOCIATION, INC.,

—and—

ROBERT E. MALONE,

*Respondents.*

ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

### Statement of Interest

The interests of the Republic of Liberia in this case are limited, but nonetheless important. Petitioners would blockade Liberian vessels from American ports—at least until Petitioners were assured freedom from economic competition by Liberian (and other) vessels not subject to their hegemony. But Liberian vessels are entitled to compete for the carriage of goods to and from the United States

and this freedom of competition, reciprocal with the same freedom to United States vessels trading to Liberia, is guaranteed by a long-standing mutual treaty between the two nations. It is the position of the Republic of Liberia that Petitioners' actions, and those of their individual members, constitute a transgression of treaty rights which is not sanctioned or protected by the Constitution of the United States but, on the contrary, is in violation of the law of this land.

Accordingly, the Republic of Liberia requests the permission of the Court to appear herein and to submit the following brief in the capacity of *amicus curiae*. Both Petitioners and Respondents have consented to the filing of this brief.

The Republic of Liberia respectfully urges this Honorable Court to affirm the judgment of the court below.

## Opinions Below

The opinions and orders of the courts below appear at pp. 5a-30a of the Appendix to the Petition for Certiorari herein.[1]

## Question Presented

Whether the calculated actions of Petitioners, claimed by them to be "informational" only but so carried out as to abridge rights guaranteed by international treaty, are sanctioned or protected by the freedom of speech clause of the First Amendment to the Constitution of the United States.

[1] All such "a" page references following are to the Appendix to the Petition.

## Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND LIBERIA. SIGNED AT MONROVIA, AUGUST 8, 1938. (54 STAT. 1739.)

### ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted . . . to engage in . . . commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; . . . and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it . . . .

. . . . . .

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

. . . . . .

### ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

### Article XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

### Article XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

### Article XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the

same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

## Statement of the Case

The Republic of Liberia adopts the statement of the case appearing in the Brief of Respondents.

## Summary of Argument

The United States and Liberia have reciprocal Treaty obligations to ensure freedom of commerce and navigation each to the other's vessels and cargoes. Petitioners and their members, as individual citizens of the United States, are bound to honor the Treaty obligations and to take or cause to be taken no action for the purpose of impairing rights guaranteed by the Treaty. The action of Petitioners in the case at bar is deliberately calculated to impair Treaty rights, and constitutes as well a wrongful interference with the rights of Respondents. Petitioners' conduct is therefore unlawful and is not sanctioned or protected by the First Amendment. The judgment of the court below is correct and should be affirmed.

# ARGUMENT

## I.

### Introduction

Alcon Ltd., owner of the S/S AQUA GLORY (Official Number 2768), is a Liberian corporate national;* as such, it is entitled to the rights and protections guaranteed by the United States under treaty obligation—even as, in the past, the same rights and protections have been extended by Liberia to corporate nationals of the United States.

The treaty here drawn into principal consideration is the Treaty of Friendship, Commerce and Navigation (hereafter "FCN") between the United States and Liberia signed at Monrovia on August 8, 1938. The Treaty is completely reciprocal in its terms, and was drawn to accommodate subsequent changes in maritime circumstance, though at that time the maritime power of Liberia was very small, and that of the United States very great. Liberia, then as now, was a country rich in natural resources which were beginning to be exported in quantity; the only means of such commerce being the sea, the potential benefit to American Flag shipping was obvious.

The effect of this Treaty was to open up the commerce of Liberia to the United States on a most-favored nation basis. But beyond "most-favored-nation" clauses, certain explicit rights in respect of navigation and merchant shipping were granted by each Party to the other; those most relevant to this case are contained in Articles VII, XIV, XV, and XVI, which are set out *supra* pp. 3-5.

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* Indeed, the vessel is guaranteed her rights by the Treaty irrespective of her ownership; see Article XV and also Articles XIV and XVI of the FCN Treaty, *supra* pp. 4-5.

The issue in this case is of absolutely crucial international importance. A treaty right ignored is a treaty right abrogated; and a treaty obligation ignored becomes no obligation at all. Nowhere are such treaty questions more important than here, where the national security and international commerce of the contracting Parties are directly and obviously affected by the outcome.

A substantial percentage of imports to, and exports from, the United States of America are carried by Liberian vessels, pursuant to the FCN Treaty. If vessels of the Republic of Liberia may actually be blockaded by Petitioners from ports of the United States of America, the result must be that both the economies of Liberia and the United States will suffer.

But the vital questions of law, both domestic and international, overshadow even the considerable economic impact. For the Treaty here in question between the United States and Liberia undertakes that:

> ". . . there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties . . . shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation." [1]

and that

> "Merchant vessels . . . under the flag of either of the High Contracting Parties *shall be permitted to discharge* portions of cargoes at any port open to for-

[1] Article VII.

> eign commerce in the territories of the other High Contracting Party . . . and they *shall be permitted to load* in like manner at different ports in the same voyage outward . . . ."[2]

A classic exposition of the nature of treaties and their status as the supreme law of the land under the Constitution[3] is that of John Jay in *The Federalist,* No. LXIV:

> "Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as

[2] Article XVI. Italics supplied.

[3] Constitution of the United States of America, Article VI, cl. 2.

> they will be at any future period or under any form of government."

Put another way, the sanctity of a treaty rests upon a pledge made before the world by the States party to it that it is a solemn contract, made for consideration, which each commits itself to uphold and which each may hold the other to.

## II.

**The individual and collective actions of Petitioners and their members violate the FCN Treaty.**

It is, of course, one of the "facts of life" in the maritime commercial world of today that American seamen enjoy, by far, the highest wage scale in the industry. In that sense, alone, the wages of the crews of every non-American merchant ship in the world are "substandard." Petitioners have created a situation in which their wage scale is far from standard and is inflated to a non-competitive level. They would therefore blockade the navigation and maritime commerce of Liberian vessels having competitive wage scales—by actions which are intended and designed to curb the free and effective access of ships of a friendly foreign government to United States ports, working a severe disruption if not a cessation of this foreign commerce; for as stated by this Court in *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865):

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals."

It is also a fact that the actions and objectives of Petitioners (including here, as elsewhere in this brief, their

individual members) in this case are discriminatorily directed at merchant vessels and cargoes of the Republic of Liberia, both as compared to those of the most favored of other foreign nations and to American Flag vessels and cargoes themselves (6a-8a).

A similar ability to disregard treaties guaranteeing freedom of commerce and navigation was once asserted on behalf of certain patentholders; but as this Court said, in *Brown* v. *Duchesne,* 60 U.S. (19 How.) 183 (1856), at 197-198:

> "The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations. . . . And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual."
>
> ". . . [T]he Government would be unable to carry into effect its treaty stipulations without the consent of the patentee. . . . The same difficulty would exist in

> executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power. . . ."

The deliberate disruption by Petitioners of the navigation and commerce of Liberian vessels is, *ipso facto,* in violation of the FCN Treaty.

The most authoritative general pronouncement on the binding effect of treaty provisions on private citizens was made by Chief Justice Taney in *Kennett* v. *Chambers,* 55 U.S. (14 How.) 38 (1852), at 49-50:

> "The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the

> scope of this delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made."

Moreover, the duty and obligation of individual citizens of the United States to abide by the letter and spirit of the FCN Treaty with Liberia was declared in the Proclamation of President Roosevelt dated November 13, 1939, publishing the terms of the Treaty. 54 Stat. 1750 (1941).

> "NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and *every article and clause thereof may be observed and fulfilled with good faith by* the United States of America and *the citizens thereof.*" (Italics supplied.)

In considering the force and effect of this Proclamation it must be borne in mind that in the area of treaty construction, the interpretations made by the executive are entitled to great weight before the courts. *Sullivan v. Kidd,* 254 U.S. 433, 442 (1921).

This FCN Treaty, unmodified by the Parties and unaltered in its effect, stands as the supreme law of the land. The actions of Petitioners are in direct violation of this Treaty and of that law.

## III.

**The actions of Petitioners and their individual members in the instant case are neither sanctioned nor protected by the First Amendment.**

As Petitioners' brief seems at pains to point out (pp. 4-7), the picketing campaign was planned in detail, with extreme care, at the highest national level of Petitioners' organizations. Petitioners' "Committee of American Maritime Unions" even prepared and distributed from a central location a kit of carefully worded picket signs, pamphlets and instructions to local union representatives. The printed instructions (Petitioners' brief, pp. 6-7) refer to "publicity picketing"—yet one is struck by certain of the particular instructions, *e.g.*, number 3: "Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet." Or number 4: "If anyone asks . . . whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet." Or number 5: "In response to any inquiries . . . refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More."

Plainly, there was something about this "publicity picketing" concerning which Petitioners wanted no publicity at all—even to the ironical degree that free speech by the pickets themselves had to be restrained. From later evidence it is both logical and fair to conclude that what Petitioners feared to publicize was a most hoped-for effect of their campaign, the blockading of the vessels named on the picket signs. In order to achieve this, Petitioners were willing to bring the business of entire ports to a stop and to

interdict the flow of interstate and international commerce (20a-21a, 24a).

This conduct constituted a treaty violation by Petitioners as to the AQUA GLORY and her owner and was thus unlawful, but it was also a wrongful interference with the rights of Respondents to carry on their businesses. When Petitioners' covert purpose was revealed to the trial court it issued a preliminary injunction in conformity with the law of Alabama, which order has been sustained by the highest court of that State.

Petitioners now bring to this Court the argument, reduced to its essentials, that so long as the picketing was informational and peaceful it was protected by the First Amendment to the Constitution, as made applicable by the Fourteenth Amendment. But the matter is not that simple where, as here, there was not merely an informational but also a disguised purpose, which had as its objective an unlawful and a wrongful interference with the rights of others. Numerous cases carried to this Court have made it clear that the First Amendment is not a license to abridge the rights of others; see, *e.g., Baines* v. *City of Danville, Va.*, 337 F.2d 579 (4 Cir. 1964), *cert. denied*, 381 U.S. 939. It has been made equally clear that not all conduct claimed to have a communicative purpose is protected by the First Amendment; see, *e.g., Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969), *aff'd*, 396 U.S. 277. Surely, where "publicity picketing" is carried out not only for the purpose of information but also to achieve unlawful and wrongful objectives, it may safely be enjoined without infringement upon the free speech guarantee of the First Amendment[1]—particularly where, as here, it would have been an easy matter for Petitioners to arrange purely informational picketing which

[1] See *Twin Falls Construction Co.* v. *Operating Engineers Local No. 370*, 95 Idaho 370, 509 P.2d 788 (Sup. Ct. 1973). On the question of pubic policy, see *Bridges* v. *Davis*, 443 F.2d 970 (9 Cir. 1971), *reh. denied* 445 F.2d 1401, *cert. denied* 405 U.S. 919.

did not actuate, or incite others to give effect to, their contrived blockade.

Petitioners cannot hold the First Amendment of the American Constitution before them as a screen for otherwise unlawful and wrongful conduct.

## CONCLUSION

**The judgment below should be affirmed.**

Dated: August 8, 1974

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on this 8th day of August, 1974, three copies of the within Brief *amicus curiae* were mailed, postage prepaid, to Counsel for the parties listed below. I further certify that all parties required to be served have been served.

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